No. 96-1018

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BRIAN D. WILSON, an individual,
by and through Melinda Wilson as Conservator
of the Person and Estate of Brian D. Wilson,
TODD GOLD, an individual,
and
BRAINS AND GENIUS, a California partnership,

Petitioners,

v.

BROTHER RECORDS, INC., a California corporation,
BROTHER TOURS, INC., a California corporation,
and
ALAN JARDINE, an individual,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of New Hampshire

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court may constitutionally exercise personal jurisdiction over out-of-state libel defendants who wrote a book they knew would injure the non-resident plaintiffs' reputation in the forum state, when the defendants intended to have the book distributed in the forum state, engaged in promotional activities designed to increase sales of the book in the forum state and elsewhere, and had a direct economic interest in sales of the book in the forum state?

CORPORATE DISCLOSURE STATEMENT

Brother Records, Inc. and Brother Tours, Inc. are California corporations which are closely held. Neither entity has a parent company. Neither entity possesses any non-wholly owned subsidiaries.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brother Records, Inc., Brother Tours, Inc. and Alan Jardine respectfully submit the following Brief In Opposition to Petition For Writ of Certiorari.

STATEMENT OF THE CASE

Respondents concur in the procedural history of the case set forth on page 7 of the Petition for Writ of Certiorari submitted by Petitioners Brian D. Wilson, Todd Gold and Brains and Genius. Respondents, however, believe that the Petitioners have neglected to inform the Court of many important facts necessary for permitting the Court to determine whether a Writ of Certiorari should be granted in this case.

This action for defamation and other related torts arises out of the 1991 publication of *Wouldn't It Be Nice*, a book which labels itself as an autobiography of Petitioner, Brian D. Wilson ("Wilson"). Wilson is a founding member of the popular music group, the Beach Boys. The plaintiffs below are Respondents Brother Records, Inc., Brother Tours, Inc. (collectively, "Brother") and Alan Jardine. Brother are the corporations through which the Beach Boys conduct their business activities. Alan Jardine is one of the members of the Beach Boys band. App. 34, 41.

Although *Wouldn't It Be Nice* purports to be Wilson's memoirs, Wilson has suffered from severe mental illness

since the mid 1960s. App. 45.[1] During the 1980s, Wilson fell under the influence of Eugene Landy, an unorthodox psychologist who is a defendant below, but who waived his defense of lack of personal jurisdiction. App. 14-15. In the name of "therapy", Landy took control of Wilson's music and business interests. After the California Board of Medical Quality Assurance threatened to commence disciplinary proceedings because of conflicts of interest, Landy surrendered his license to practice psychology and became Wilson's "business manager". In either capacity, according to Respondents' Complaint, Landy had complete control over all aspects of Wilson's life. This resulted in members of Wilson's family petitioning the California Superior Court to impose a conservatorship over Wilson to free him from Landy's influence. App. 42-43. It also resulted in substantial negative publicity about Landy in the national media.

With a battle over Landy's relationship with Wilson being fought in the courts and the media, Landy recognized that he could use Wilson's "autobiography" as a weapon to win the war. Landy realized there was considerable public interest in Wilson's unusual life, and he could use such a book to tell his side of the story. A major theme of the book became that it was the Beach Boys' exploitation of Wilson's talent that had caused Wilson's mental illness, and that Landy's unorthodox treatments

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[1] In other legal proceedings Wilson claimed he was legally incompetent during most of the period recounted in *Wouldn't It Be Nice*. App. 45. In 1992, shortly after the book was published, the California Superior Court appointed a conservator for Wilson's person and estate. App. 69.

were necessary to save Wilson from his band mates. App. 44.

Landy and Wilson also viewed the autobiography as an opportunity to make money. They formed a new business entity, Petitioner Brains and Genius, a partnership, to produce the book and have it published. To attract a publisher, they distributed a proposal to numerous publishing houses which emphasized the national market for a book about Wilson and the Beach Boys. The Proposal emphasized that hundreds of millions of Beach Boys' recordings had been sold throughout the country, that the Beach Boys were one of the most popular and profitable touring attractions in music, and that dozens of articles on the Beach Boys had appeared in national magazines. App. 172-173. The publisher of an autobiography of Brian Wilson, the Proposal argued, could exploit this huge market for information and gossip about one of the country's most popular rock bands. The proposal also emphasized that Landy and Wilson were willing to participate in a "full publicity tour" to assist the marketing of the finished work. App. 174.

As a result of the Proposal, Brains and Genius signed a publishing agreement with Harper & Row, Inc. the predecessor of Respondent HarperCollins Publishers, Inc. ("HarperCollins"). That agreement is further evidence that the Petitioners intended to distribute *Wouldn't It Be Nice* nationally. In the publishing agreement Brains and Genius granted HarperCollins the exclusive right to distribute the book "throughout the United States". App. 135. Wilson agreed to "participate in a four-week author promotion tour covering a minimum of twelve cities"

when the book was initially published. He was also obligated to participate in a satellite tour, to make appearances on major network television shows and to appear at a trade show convention to publicize the book. App. 138-139. Moreover, if the publisher decided to publish a trade paperback edition, Wilson was required to perform a second publicity tour. *Id.* Brains and Genius, under the contract, would receive a royalty equal to a percentage of the suggested customer's price or the amount received by the publisher for each copy of the book sold. App. 140-143.

Brains and Genius also entered into a contract with Petitioner Todd Gold ("Gold"), a professional writer. Gold was hired to research and write the manuscript and was required to insert any "changes, editions, eliminations" Wilson and/or Landy deemed necessary or desirable. App. 120. Gold knew he was supposed to create a book that would generate national interest. He participated in the creation of the Proposal and the term of his services was to last "until the general release of the Autobiography through normal retail channels in the United States". App. 119-120, 167. Further, Gold's contract, like Brains and Genius' publishing agreement, gave Gold a personal financial stake in every copy of the book sold in New Hampshire and elsewhere. Gold was entitled to one third of the "net income" derived from the book, which included one third of the royalties Brains and Genius received from nationwide book sales. App. 123.

In its final form, *Wouldn't It Be Nice* was the type of sensational "kiss and tell" book foreshadowed by Brains and Genius' proposal. Its dust jacket promised readers that they would learn "the truth about the rumors and

myth" concerning the Beach Boys, as well as "the bitter infighting among Brian and the Beach Boys, which continues to this day". App. 178. The book is filled with gossip about the band and the Beach Boys are depicted in an unflattering light, to say the least.[2] Much of what is depicted in the book, however, is false. Freed from Landy's influence, even Wilson, in subsequent legal proceedings, admitted that much of the book was "garbage". He has used even stronger epithets to describe the work. App. 51-52.

Wilson did tour in support of the book. He appeared on national television shows to publicize the "autobiography" and conducted numerous interviews. Although Wilson did not actually set foot in New Hampshire as part of the publicity tour, some of the print and radio interviews he did in support of the book were directed to the New England audience, and some were broadcast within New Hampshire. The Complaint alleges that some of these interviews repeated the defamatory allegations. App. 46. Thousands of copies of the book were distributed in the state, and at the time the Complaint was filed, the book was still available in New Hampshire libraries and bookstores. App. 46.

Based on the evidence summarized above, the Supreme Court of New Hampshire concluded that each of the Petitioners "deliberately exploited the New Hampshire market". App. 32. Consistent with this conclusion, it

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[2] A summary of the statements in the book alleged to be defamatory is found in paragraph 22 of the Complaint. App. 47-51.

found that it was reasonably foreseeable that the Petitioners would be sued in New Hampshire in connection with the publication of *Wouldn't It Be Nice*, and that each of the Petitioners had sufficient contacts with New Hampshire to justify the exercise of jurisdiction. App. 33-34.

REASONS FOR DENYING THE PETITION

A. The Federal Issue Presented By This Case Is Fact Specific And Is Controlled By Established Principles This Court Has Clearly Articulated In Past Decisions

Respondents admit there are interesting aspects to this case, particularly since it concerns individuals who are well known to the public. *Wouldn't It Be Nice* is literally replete with sex, drugs and rock 'n roll. But an interesting case is not the same thing as an important case, and this case does not raise issues sufficiently worthy of this Court's attention. The constitutional issue arises from a fact pattern which does not frequently occur. Moreover, the issues can easily be decided by applying established jurisdictional principles which have been plainly articulated in the Court's prior precedents. A decision in this case is unlikely to add anything to this Court's jurisprudence on the requirements of personal jurisdiction.

The issue raised by this case – whether a non-resident author can properly be sued in a jurisdiction which is not the residence of the plaintiff or the forum most closely connected with an allegedly libelous work – is one

which infrequently arises. Such controversies are rare because most defamation actions are commenced in the plaintiff's home forum, and most states have enacted borrowing statutes which apply the statute of limitations of the plaintiff's home jurisdiction, providing little reason to institute suit in a foreign forum. In those unusual cases where a non-resident libel action is instituted, whether state courts can exercise personal jurisdiction over the non-resident author is usually a question of little practical significance. If the author is an employee of the publisher or distributor, the latter is liable for the author's work under respondeat superior, the standard for liability is identical, and under *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), there is usually jurisdiction over the publisher or distributor. Thus, it is only in cases like this one, where the author has independently contracted with the publisher, and their standards of liability may be different, that jurisdictional questions regarding the author become significant.

The rarity of this issue arising is demonstrated by the fact that more than a dozen years after this Court's decision in *Keeton*, this is the first time any appellate court has examined the constitutionality of exercising jurisdiction over a non-resident author in a libel action filed by a non-resident. Indeed, prior to the Supreme Court of New Hampshire's decision in this case, the only three reported decisions on this issue were from the District Court for the District of New Hampshire. See *Gray v. St. Martin's Press, Inc.*, 929 F.Supp. 40, 47-48 (D.N.H. 1996) (New Hampshire had jurisdiction over author who claimed that a Florida resident, a former Washington lobbyist, had improperly influenced national politicians). *Faigin v.*

Kelly, 919 F.Supp. 526, 532-533 (D.N.H. 1996) (New Hampshire had jurisdiction over authors of an autobiography of a football quarterback who never played in New Hampshire); *Buckley v. McGraw-Hill, Inc.*, 762 F.Supp. 430, 436-439 (D.N.H. 1991) (New Hampshire had jurisdiction over Business Week editors and reporters who collaborated on an article concerning a Pennsylvania executive). Petitioners' claim that an important constitutional issue is at stake cannot be accepted when the issue has almost never been reported.

A novel factual scenario may still give rise to an important case if the federal issues have never been considered by the Court, or the area requires elucidation because of conflicting precedents or new developments. But that is not the case here. The Court has addressed jurisdictional problems which arise in multi-state libel actions in *Keeton* and *Calder v. Jones*, 465 U.S. 783 (1984). The parties actually agree that the Court's prior jurisdictional precedents, *Calder, Keeton, Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) state the principles which apply to this case and neither side urges the Court to reconsider its prior rulings. The principle disagreement is whether the Supreme Court of New Hampshire properly applied those principles to the specific facts in this case, and whether the evidence supported that court's conclusion that Petitioners had deliberately exploited the New Hampshire market.

These are the types of issues which do not require the intervention of the United States Supreme Court. It is well established that this Court's function is not merely to review the decisions of the nation's appellate courts for

potential errors. Yet that is precisely what the Petitioners seek here. They ask this Court personally to apply the standards it has previously enunciated to insure the Supreme Court of New Hampshire properly performed its job. When such an exercise will neither lead to further development of the law, or provide guidance to the nation's courts on issues they will regularly address, granting a writ of certiorari would constitute a waste of this Court's valuable resources.

B. The Supreme Court of New Hampshire's Ruling Does Not Conflict With Any of The Relevant Decisions of This Court

Petitioners argue that the lower court's decision conflicts with this Court's precedents because neither *Calder* or *Keeton* expressly authorized the exercise of jurisdiction over non-resident authors in these circumstances within the four corners of those decisions. They assert that the jurisdictional bases described in *Keeton* and *Calder* are limited to the specific facts in those cases. Thus, Petitioners argue that *Keeton* limits a non-resident plaintiff's ability to bring a libel action against non-resident defendants to those media companies who continuously engage in the sale of thousands of copies of their product within the forum. Similarly, according to the Petitioners, an out-of-state author can only be successfully sued in the single jurisdiction which was the "focal point" of an allegedly defamatory work and where the bulk of harm caused by the work occurred.

There is no question that the factors identified by the Petitioners were relevant factors which the Court relied

upon in making its decision in those cases. But nothing in either *Keeton* or *Calder* indicated that those decisions staked the furthest boundary of personal jurisdiction in multi-state defamation claims. Both cases' unanimous decisions strongly suggest that this Court recognized that the exercise of personal jurisdiction in those situations was well within "the traditional notions of fair play and substantial justice" which this Court has outlined since its decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The Supreme Court of New Hampshire's decision is completely consistent with the principles of *Keeton* and *Calder*. In *Keeton* this Court recognized that a state which might not have the most direct connection with a libel plaintiff may still have a substantial interest in hosting a libel claim based on a national publication. 465 U.S. at 775-777. In particular, the Court recognized that although a greater quantity of harm might have occurred in other jurisdictions, the circulation of defamatory material in New Hampshire constitutes tortious conduct within the state which New Hampshire has an interest in deterring. *Id.* at 776-777. On the very same day, this Court also recognized in *Calder* that jurisdiction could properly attach over an out-of-state author or editor whose only contact with the jurisdiction was the ability to destroy a reputation within the state. 476 U.S. 788-790. Although in the specific case before it the Court noted that the brunt of the injury caused by the defendants' actions would likely be felt in the forum, it also made it plain that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California". *Id.* at

790. Where the Petitioners knew their work would be circulated in New Hampshire and also knew that such circulation would damage the Respondents' reputation in that state, the same logic compels a finding of jurisdiction here.

The Supreme Court of New Hampshire's decision is also consistent with this Court's holdings in non-libel cases. Although HarperCollins was the party that actually distributed *Wouldn't It Be Nice* in New Hampshire, it was the Petitioners who "manufactured" the product HarperCollins distributed. The publishing contract gave Brains and Genius control over the final content of the book. App. 137. Thus, when Petitioners' product tortiously caused injuries in the jurisdiction into which it was shipped, modern jurisdictional principles clearly establish that the New Hampshire courts could properly hold the product's creators responsible for the damage. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297-298, this Court stated that when a commercial actor attempts

> "to serve directly or indirectly the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has been a source of injury to its owners or to others. The forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State".

See also *Burger King v. Rudzewicz*, 471 U.S. 462, 473 (1985). There is no reason why this well-recognized theory of

jurisdiction would only permit states to exercise jurisdiction over the creators of automobiles, defective appliances and boilers, but not books. The Supreme Court of New Hampshire's decision was consistent with the principles stated in *World-Wide Volkswagen*.

Notwithstanding clear precedents permitting the New Hampshire court's action, Petitioners assert that the lower court's decision is in conflict with *Asahi Metal Industries, Co. v. Superior Court of California, Solana County*, 480 U.S. 102, 110-113 (1988). There are several difficulties with this argument. First, the portion of *Asahi Metal* which Petitioners rely upon, Part II-A of Justice O'Connor's opinion, was not adopted by the entire Court and is only a plurality decision. Second, *Asahi Metal* is factually distinguishable. There, the defendant was the manufacturer of a valve stem, which was purchased by a manufacturer of tire tubes, whose product was in turn purchased by a manufacturer of tires, which product was in turn purchased by Honda for incorporation into a motorcycle. Honda itself appears to have shipped the finished motorcycle into the United States through a distributor. The defendant, accordingly, was several times removed from the entity which introduced the product into the state, and appears to have had little input into whether its product would be introduced into the United States. Certainly, it did not contract with the entity that actually introduced the finished product to the forum. In contrast, the Petitioners designed their product for national consumption, knew their product would be distributed in the forum state, and took active steps to market their product to consumers who lived in New

Hampshire through national and regional publicity. Further, the valve stem manufacturer's economic interest ended when he sold the valve stems in Taiwan. But Petitioners' economic interest remained after HarperCollins began distributing the book in New Hampshire. Each time the book was sold, each Petitioner was entitled to a royalty payment. The plurality in *Asahi Metal* asserted that jurisdiction should not attach when a defendant merely placed his product in the stream of commerce and made no effort to direct it to particular consumers. The case at bar is a far cry from that scenario.

Perhaps most important, in *Asahi Metal* even the plurality recognized that a different result should occur when the defendant's conduct indicated "an intent or purpose to serve the market in the forum state". 480 U.S. at 112. The Supreme Court of New Hampshire specifically found "the defendants deliberately exploited the New Hampshire market". App. 32. This factual conclusion is sufficient to constitute "purposeful availment" even under the more rigorous test proposed by the plurality in *Asahi Metal*. Thus, even if this Court were inclined to revisit the issue of what type of conduct is necessary for jurisdiction to attach under the "stream of commerce" theory, this is not the case to do it. Sufficient factual findings support jurisdiction under any of the tests which have been proposed.

As noted above, Petitioners' real dispute is not with the constitutional principles applied by the Supreme Court of New Hampshire, but with their factual conclusion that Petitioners deliberately intended to exploit the New Hampshire market. Although this Court has the power to decide whether the highest court of a state

reached a permissible factual conclusion, the Court's resources should simply not be devoted to such a review.

C. The Supreme Court of New Hampshire's Decision Does Not Conflict With Any Decisions of United States Courts of Appeals

The Petitioners' principal argument for granting certiorari is that the Supreme Court of New Hampshire's decision conflicts with two decisions of United States Courts of Appeal, *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir.), *cert. denied*, 117 S.Ct. 53 (1996) and *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir.), *cert. denied*, 115 S.Ct. 423 (1994). A quick review of these cases will demonstrate that *McFarlane* did not reach the constitutional issue and was not even decided on a federal issue, while the fact situation in *Reynolds* was substantially different than the one posed by the present case.

McFarlane was a libel claim brought by a former National Security Advisor in the District of Columbia due to the publication of an article in *Esquire* which accused him of being an agent for Israeli intelligence services. Although the Court of Appeals affirmed the District Court's conclusion that the District of Columbia could not exercise personal jurisdiction over a New York author, neither Court did so because the exercise of jurisdiction would offend the Due Process Clause. Instead, the action was dismissed on "state law" grounds: the non-resident author was not subject to service of process under the District of Columbia's long-arm statute, D.C. Code 1981 § 13-423(a). 74 F.3d at 1300-1301.

Unlike many long-arm statutes, the District of Columbia's statute does not extend to the full limits permissible under the United States Constitution. *Parsons v. Mains*, 580 A.2d 1329, 1331 (D.C. 1990).[3] The statute did not extend jurisdiction to persons whose tortious conduct caused injury within the District unless the person engaged in an act or omission within the District. McFarlane could not prove that the author of the magazine article had performed or failed to perform any action within Washington D.C. and his inability to provide this factual predicate deprived him of the ability to use the District's long-arm statute.

A similar statutory ground for declining jurisdiction does not exist here. Indeed, the case *McFarlane* relied upon for holding that a non-resident defendant must perform some act or omission within the District, *Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217, 221 (D.C. Cir. 1986) expressly distinguished New Hampshire's long-arm statute from the District's. The New Hampshire statute, N.H. Rev.Stat.Ann. § 510:4, does extend to the full limits of the U.S. Constitution. *Keeton*, 465 U.S. 770, 774, n.4; *Estabrook v. Wetmore*, 129 N.H. 520, 522, 521 A.2d 956, 958 (1987). Indeed Petitioners have conceded that they

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[3] The District of Columbia Court of Appeals has recognized that one part of the District's long-arm statute does extend to the limits of due process, § 13-423(a)(1) (permitting service of process when a claim for relief arises from a person's "transacting any business" in the District of Columbia). In *McFarlane*, however, the plaintiff did not assert jurisdiction under subsection (1). He claimed personal jurisdiction attached under §§ 13-423(a)(3) and 13-423(a)(4), two sections of the long-arm statute which did not extend to the full limits of the Constitution. 74 F.3d at 1300.

are amenable to service of process under the New Hampshire long-arm statute. App. 5, 25. Thus, there is no conflict between *McFarlane* and the New Hampshire court's decision.

In *Reynolds* the Sixth Circuit refused to find the author of an allegedly defamatory press release that was republished in Ohio amenable to that state's jurisdiction. The key facts in that case are so different, however, that there is no conflict with the opinion. In *Reynolds* an international athletic association based in London, England issued a press release stating that a Paris laboratory had found evidence that a U.S. athlete had improperly used drugs in a Monte Carlo track meet. The press release was picked up by various U.S. publications and republished in the athlete's home state of Ohio. He sought to obtain jurisdiction over the athletic association for defamation and other torts which arose out of the association's actions against him.

In *Reynolds*, though, the defendant had no connection with the state of Ohio and it was completely through the acts of third parties with whom it had no affiliation that the allegedly defamatory remarks were republished. Unlike here, the defendant did not have a contract with an agent to make sure the defamatory information was circulated within the forum jurisdiction. Nor did the athletic association issue its statement as part of pre-conceived commercial venture in which the athletic association intended to receive revenues from the dissemination of the information in the forum. And certainly the athletic association did not receive a cash royalty each time the press release was republished within the jurisdiction. In short, unlike the case at bar, there was no

evidence in *Reynolds* that the defendant intended to commercially exploit a market within the forum state.

Contrary to the Petitioners' assertions, the distribution of *Wouldn't It Be Nice* within New Hampshire was not "merely foreseeable", it was deliberate. It was part of a commercial venture to profit from the provision of gossip. This court has recognized that where commercial actors "purposefully derive benefit" from their interstate activities, it is not unfair to require them to account in other states for the consequences that arise proximately from such activities. *Burger King v. Rudzewicz*, 471 U.S. at 474. That is precisely the action the Supreme Court of New Hampshire took when it affirmed the Superior Court's jurisdiction over the Petitioners. Such action does not conflict with any opinion of this Court or any decision of any other appellate court, federal or state.

CONCLUSION

For the reasons set forth above, the Writ of Certiorari should be denied.

Respectfully submitted,

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